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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 987

JOSEPH L. NELLIS,

Petitioner,

v.

CENTRAL DISTRIBUTORS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph L. Nellis
640 Federal Bar Building West
1819 H Street, N.W.
Washington, D.C. 20006

November 19, 1970

Pro Se

Washington, D. C. WEST PRESS INC. 20001

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

JOSEPH L. NELLIS,

Petitioner,

v.

CENTRAL DISTRIBUTORS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Joseph L. Nellis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 22, 1970.

OPINIONS BELOW

The Opinions of the Court of Appeals are reported at 403 F.2d 943, and 428 F.2d 371. For the convenience of the Court, these opinions and the Judgment of the Court of Appeals have been reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1970. By order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was first extended to October 30, 1970, and on October 26, 1970, the time within which to file a petition for a writ of certiorari was further extended by him to November 20, 1970. This petition was filed November 19, 1970. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether in a judge-tried breach of contract case in which the issue of damages was complex, Petitioner's rights to procedural due process of law were violated by the trial court's failure to perform its mandatory judicial function to "find the facts specially" (Rule 52(a) F.R.C.P.)?

2. Whether the Court of Appeals violated Petitioner's rights to procedural and substantive due process by according full weight to findings of fact and conclusions of law drafted by counsel for the Respondent and mechanically adopted by the District Court?

3. Whether Petitioner's rights to due process were violated by the lower federal court's refusal to follow the numerous precedents of this Court requiring the United States District Courts, in civil cases, to apply the substantive law of the State in which it resides?

STATEMENT OF THE CASE

Jurisdiction of this action was based upon diversity of citizenship and jurisdictional amount. 28 U.S.C. §1332(a). On or about October 26, 1963, Mutual Employees Trademart, Inc., a corporation of which Petitioner was President and majority stockholder and which was in the retail department store business, entered into a leasehold and license agreement with Respondent. Certain provisions of this agreement, under which Respondent operated the retail hardware department within the store, were personally guaranteed by Petitioner. Among the terms of the lease guaranteed by Petitioner was one requiring M.E.T., Inc. to purchase, on a stated basis, Respondent's fixtures and inventory on hand if Respondent failed to gross $350,000 in retail sales within the first year of its operation.

Petitioner struck from this accommodation guaranty a self-serving provision inserted by Respondent alleging personal consideration for his guarantee of the Respondent-Mutual Employees Trademart, Inc., lease agreement. In November, 1964, the owners of the property on which the retail store was being operated by Mutual Employees Trademart, Inc., repossessed the premises for non-payment of rent. Thereafter, on December 10, 1964, Respondent served notice on Mutual Employees Trademart, Inc., but not upon Petitioner, that its retail sales for the period December 1, 1963-November 30, 1964, had been below the gross retail sales of $350,000.00, and accordingly, notice was given by Respondent to Mutual Employees Trademart, Inc., that it was terminating the lease and license agreement pursuant to the terms thereof. Prior to November 24, 1964, however, Respondent had breached the lease and license agreement by non-payment of rent for the months of October and November, 1964. Evidence of these said prior breaches of the lease agreement was excluded from the first trial of this case because in the words of the District Court

"it was not raised in the pretrial stipulaton."[1] Although M.E.T., Inc., ceased doing business on November 24, 1964, Respondent remained on the store premises until at least March, 1965, without payment of any rent to Mutual Employees Trademart, Inc., as required by its lease and license agreement. During this period of time, Respondent, among other things, conducted a "going-out-of-business sale" and pocketed both its profit and the monthly rent. Rather than disposing of the then existing in-store inventory, which it alleged Petitioner was obligated to purchase, Respondent brought additional merchandise into its department from its other retail store. After closing its leased department, Respondent shipped fixtures and equipment to a warehouse in Miami, Florida, and the remaining merchandise to its own retail establishment in Tampa, Florida and its own warehouse in Green Island, New York, where it was comingled with merchandise of the store and warehouse which received it and was eventually sold or otherwise distributed. Thereafter, Respondent decided to refixture its own Providence, Rhode Island retail establishment and shipped the fixtures which had been in the Mutual Employees Trademart, Inc., store to Rhode Island. In 1966, the Respondent sued M.E.T., Inc., and Petitioner-Guarantor in the United States District Court for the Southern District of Florida for damages on account of alleged breaches of the lease agreement and the guaranty. Because the Respondent had not complied with the discovery orders of the trial court, the United States District Court dismissed the case with prejudice. Respondent appealed this order, and the United States Court of Appeals for the Fifth Circuit reversed and remanded for a new trial (*Central Distributors, Inc. v. Mutual Employees Trademart, Inc., and Nellis*, 403 F.2d 943). In the interim, M.E.T., Inc., had been dissolved, was dismissed from this suit and this action was continued solely against Petitioner.

[1]The trial judge was reversed by the Fifth Circuit on the first appeal of this case precisely because of parallel rulings against the Respondent, the Fifth Circuit characterizing (and rejecting) this as the "sporting theory of justice".

On remand, the District Court denied petitioner's motions for a change of venue or for a second continuance, which motions were argued by Harold Shapiro, Esq., of the Miami Bar, solely as a professional accommodation to Petitioner. After so appearing, however, the trial court refused to permit Mr. Shapiro to withdraw as counsel, ordered him to attend the pretrial conference, agree to a pretrial stipulation and be present at the trial. The trial court knew that Mr. Shapiro had not been retained by Petitioner and was unfamiliar with the facts and circumstances of the case.

The District Court proceeded to trial and judgment against Petitioner. At this second trial, the Court erroneously assumed that Petitioner's liability had been established at the first trial[2] and accepted as evidence numerous conjectures and speculations with respect to the issue of damages alleged by Respondent. At the close of all of the evidence, the trial judge, from the bench, announced "General Findings and Conclusions," relying solely on a "schedule" prepared by Respondent which was not, and, as hearsay, could not have been admitted into evidence. Following this, the Court ordered counsel for Respondent, but not Petitioner's counsel, to prepare and draft a Memorandum Order, "carefully detailing" the very "General Findings" the Court had announced previously. Upon receipt of the Court's signed Memorandum Opinion, Petitioner filed a post trial motion requesting corrections of and many additions to the minimal and cursory "facts" stated in that opinion by Respondent's counsel. This motion was denied, except for the trial court's correction of a date, a minor item as compared to the errors complained of.

On appeal, the Fifth Circuit affirmed in part and reversed in part the judgment of the District Court, ruling "without merit" all but one of Petitioner's contentions. In so ruling,

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[2] At the first trial, the District Court granted Petitioner's Motion to Dismiss at the close of the Plaintiff-Respondent's case and therefore, Petitioner never had presented evidence in defense of the suit. The District Court never found Petitioner liable to Respondent.

that Court accorded full weight to all of the "District Court's" findings of fact and conclusions of law. This Petition followed.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL WITH RESPECT TO THE PROPER WEIGHT, UPON APPELLATE REVIEW, TO BE ACCORDED FINDINGS OF FACT AND CONCLUSIONS OF LAW PREPARED BY COUNSEL FOR THE PREVAILING PARTY AND MECHANICALLY ADOPTED BY THE DISTRICT COURT.

Rule 52(a) of the Federal Rules of Civil Procedure requires, in relevant part:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . ."

In this complex case which was heard by the court sitting without a jury, the trial judge announced his "General Findings of Fact and Conclusions of Law" from the bench, and then ordered counsel for Respondent

> "to prepare and submit to the Court this Memorandum Opinion, *carefully detailing the facts* that are found and the conclusions that have been made in order to support these Findings, *General Findings* and Conclusions that I have announced here today." (Emphasis supplied.)

The Court's "Memorandum Opinion," which set forth the amount of damages awarded Respondent in the Court's judgment, was drafted by Respondent's counsel and "mechanically adopted" [3] by the trial court. In fact, after ordering Respondent's counsel to prepare this opinion, the Court asked him:

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[3] *United States v. Forness*, 125 F.2d 928, 942 (2nd Cir., 1942), certiorari denied, 316 U.S. 694.

> "Now, is there any other fact that you feel that the Court should specifically find at this time as a basis for your preparation of this opinion or is there any other conclusion that you feel that the Court should announce at this time in order for you to state the Conclusion?"

The United States Court of Appeals for the Fifth Circuit, as had the District Court, ignored Petitioner's contention that he had been denied due process of law by the trial judge's failure to perform the judicial task of precise fact-finding as required by Rule 52(a). The Fifth Circuit, *sub silentio*, undoubtedly was following this Court's ruling in *United States v. El Paso Natural Gas Co., et al.* 376 U.S. 657, 12 L.Ed. 2d 17, 84 S.Ct. 1047 (1964), and its well-settled approval of the District Court practice of having counsel for the prevailing party prepare the Court's opinion. See *Louis Dreyfus and C.I.E. v. Panama Canal Company*, 298 F.2d 733 (5th Cir., 1962); *Kinnear-Weed Corp. v. Humble Oil and Refining Co.*, 259 F.2d 398 (5th Cir., 1958); *Edward Valves, Inc. v. Cameron Iron Works, Inc.*, 289 F.2d 355 (5th Cir., 1961). In *El Paso, supra*, p. 656, this Court stated:

> "There was a trial, and after oral argument the judge announced from the bench that judgment would be for appellees and that he would not write an opinion. He told counsel for appellees 'Prepare the findings and conclusions and judgment.' They obeyed, submitting 130 findings of fact and one conclusion of law, all of which, we are advised, the District Court adopted verbatim. Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by the evidence. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court." (Citations and footnotes omitted.)

Petitioner contends that this Court's ruling in the *El Paso* case amounted to a nullification of Rule 52(a), F.R.C.P. in

those circumstances, and should not be applied to the instant case,[4] but rather, the holding of *United States v. Forness*, 125 F.2d 928 (2nd Cir., 1942) should be reinstated as the proper rule of procedure to be followed as to Rule 52(a). It is noted that this Court has never determined the appropriate weight which findings of fact and conclusions of law drawn by the counsel for the prevailing party are entitled to receive upon appellate review. Logic dictates that an appellate court's decision often hinges upon the quantitative weight accorded the "lower court's" findings of fact. Recently the Third Circuit, in reversing the judgment in *Roberts v. Ross*, 344 F.2d 747 (3rd Cir., 1965) spoke out critically against the practice apparently approved in *El Paso* (and employed by the District Court in the case at bar) stating:

> ". . . the practice of announcing [a] decision for the plaintiff or the defendant substantially in the form of a general verdict, . . . and of thereupon directing counsel for the prevailing party to prepare and submit findings of fact, conclusions of law and a form of judgment . . . not only imposes a well nigh impossible task upon counsel, but also flies in the face of the spirit and purpose, if not the letter, of Rule 52(a). . . . Findings and conclusions prepared *ex post facto* by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule. At most they provide the judge with an opportunity to reconsider the basis of his original decision but without affording the parties any information as to what those bases were or which of them are being reconsidered. At worst they are likely to convict the judge of error because, as here, they are inadequate to support his decision or because . . . they are loaded down with argumen-

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[4]Post *El Paso* Courts of Appeal cases have reiterated the distaste for this District Court practice and reflect a schism of authority in the Courts of Appeals. See *Roberts v. Ross, infra* and *Wharton v. T. A. Loving Company*, 344 F.2d 739 (4th Cir., 1965).

> tative over-detailed partisan matter much of which is likely to be of doubtful validity or even wholly without support in the record."

However, the Court continued:

> "But it should be remembered that findings and conclusions prepared by a party and adopted by the trial judge without change are likely to be looked at by the Appellate Court more narrowly and given less weight on review than if they are the work product of the judge himself or at least bear evidence that he has given them careful study and revision (citing *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 259 F.2d 398, 400-401 (5th Cir., 1958). For the latter procedure would assure the Appellate Court, as Judge Wisdom pointed out in *Louis Dreyfus & CIE v. Panama Canal Company*, 5th Cir., 1962., 298 F.2d 733, 738, 'that the trial judge did indeed consider all the factual questions thoroughly and would guarantee that each word in the findings is impartially chosen.' " (*Supra*, pp. 751-52.)

Additionally, the Fourth Circuit has commented that while the trial court practice of adopting prevailing counsel's findings and conclusions is not a proper ground for reversal of the judgment,

> "these findings of fact and conclusions of law are not, at our hands, entitled to the same weight and dignity which they would have possessed had they represented the unfettered and independent judgment of the trial judge."[5]

The prevailing practice in the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits with respect to the weight properly accorded findings and conclusions drafted by prevailing counsel, however, is in direct conflict with the Third and

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[5] *The Severance*, 152 F.2d 916, 918 (4th Cir., 1945). This case concerned the Admiralty Rule 46½, the counterpart of Rule 52(a), F.R.C.P. See also *Wharton v. T. A. Loving Company*, 344 F.2d 739, 742 (4th Cir., 1965).

Fourth Circuits' holdings where such findings and conclusions are not accorded full weight. *Edward Valves, Inc. v. Cameron Iron Works, Inc., supra*, at page 356; *O'Leary v. Liggett Drug Co.*, 150 F.2d 656 (6th Cir., 1945); *Mississippi Valley Barge Line Co. v. Cooper Terminal Co., Inc.*, 217 F. 2d 321, 322-323 (7th Cir., 1955); *Bradley v. Maryland Casualty Company*, 382 F.2d 415, 423 (8th Cir., 1967); *Rederi A/B Soya v. SS Grand Grace*, 369 F.2d 159 (9th Cir., 1966). In the latter case, the Ninth Circuit expressly acknowledged this conflict prevailing in the Courts of Appeals. *Id.*, page 164.

In the instant case, so lacking in detail were the findings of fact as to damages that the Court of Appeals merely could state, in affirming in part (undoubtedly as a result, in part, of frustration and irritation):

> "we are not left with the firm, definite conviction that a mistake has been committed in connection with the awarding of damages to Central for its losses on the inventory and its closing expenses."

The clear implication of such a carefully worded but fairly common Appellate court statement, of course, is that the Court of Appeals would have preferred the trial court to have written its own memorandum opinion, incorporating therein its own detailed findings of fact as required by Rule 52(a). However, in its partial affirmation, the Fifth Circuit in this case accorded the inadequate and one-sided findings of fact and conclusions of law full weight and applied such weight against Petitioner. Petitioner submits that the Fifth Circuit applied a legally erroneous standard and that that Court should have scrutinized the District Court's findings with greater care so as to avoid the imposition of manifest injustice upon him.

Because of the above stated practice in the Fifth Circuit, Petitioner has suffered the obvious injustice which Rule 52 (a) was designed to prevent. The "District Court's" Memorandum Opinion contained numerous substantive errors and internal inconsistencies, and lacked the necessary detail and

specificity upon which a judgment might be sustained on appeal, as the Rules of Civil Procedure were designed to effectuate. Thus, the District Court's judgment, which was based on the Memorandum Opinion written by counsel for the Respondent, permitted interest upon interest (later corrected by the Court of Appeals) at apparently usurious rates (reluctantly later corrected by the District Court solely in response to Petitioner's post-trial motions); awarded damages to Respondent based upon the pure speculation and conjecture of Respondent's witnesses' testimony; and even awarded damages for an alleged loss on merchandise which Respondent brought onto the premises following the alleged breach by the Petitioner of the guaranty and which was clearly outside the terms of the license agreement, as shown by the proof. The essence of the instant Petition, however, is that other grievous substantive errors were not corrected by the Court of Appeals and thus Petitioner stands with a substantial judgment of record against him which ought to be reversed by this Honorable Court.

The fact that the Courts of Appeals are in conflict over the proper weight to be accorded findings of fact and conclusions of law not independently drafted by the trial court, with the consequential injustices thereby occurring throughout the federal court system, as well as the fact that that common District Court practice on its face violates Rule 52(a), and the fact that at least two Courts of Appeals continue to criticize such a practice, notwithstanding *El Paso*, provide ample justification and compelling reasons for this Court to issue the writ of certiorari prayed for herein in order to review and correct this common and unjust district court practice. Moreover, it is submitted that this Honorable Court will wish to resolve the conflict in the Courts of Appeals in favor of the rule of reason as exemplified by Rule 52(a).

2. THE DECISION BELOW IGNORED THE SUBSTANTIVE LAW OF THE STATE OF FLORIDA, THE SITUS OF THE CONTRACT AT ISSUE, WITH RESPECT TO LIABILITY OF A GUARANTOR. THE DECISION BELOW, THEREFORE, CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT, AND VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS.

The Florida law of guaranty is clear: any material violation of the terms of a contract by the person for whose benefit such contract is guaranteed releases the guarantor from liability. *Gato v. Warrington*, 37 Fla. 542, 19 So. 883 (1896); *Hollywood Shopping Plaza, Inc. v. Schulyer*, 179 So. 2d 573 (Fla. App., 1965). Notwithstanding this well settled rule of law, both the United States District Court and the United States Court of Appeals for the Fifth Circuit ignored, without comment, the admittedly material breaches of the license agreement by the Respondent herein prior to and subsequent to M.E.T.'s insolvency.

Respondent's primary obligation under the license agreement was to pay rent to M.E.T. each and every month. If consideration for Petitioner's otherwise gratuitous guaranty is to be found anywhere in this license agreement, it is with respect to this obligation of Respondent to pay rent each and every month to M.E.T. When, therefore, Respondent failed to pay rent for the months of October and November, 1964, and also failed to remit rent following M.E.T.'s insolvency—all the while remaining and conducting business on the leased premises and at all times without the consent of either M.E.T. or the Petitioner—as a matter of Florida law, Petitioner was discharged from his guaranty. In the first trial of this case, liability was neither determined in the District Court nor affirmed on appeal. In the trial on remand, the District Court merely assumed the liability of Petitioner, over Petitioner's objection. In the Fifth Circuit Court of Appeals the Court simply ignored the point without comment, although it constituted the prime basis of Petitioner's denial of liability.

Ever since *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1118 (1938), this Court has steadfastly adhered to the rule that the federal district courts in civil law matters must follow the law of the State in which it presides. *Guaranty Trust Co. of New York v. New York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945); *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8 (1965).

The District Court and the Court of Appeals below have failed to adhere to this rule in this case to the great detriment of Petitioner. Such conflict with the substantive law of Florida and with the precedents of this Court relating to the law to be followed justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Joseph L. Nellis, Pro Se
1819 H Street, N.W.
Washington, D.C.

APPENDIX
IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28598

CENTRAL DISTRIBUTORS, INC.,
Plaintiff-Appellee,

versus

M.E.T., INC.,
Defendant,

and JOSEPH L. NELLIS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part in accordance with the opinion of this Court.

It is further ordered that plaintiff-appellee be condemned to pay one-third of the costs on appeal in this Court and that defendant-appellant be condemned to pay two-thirds of said costs.

June 22, 1970

Issued as Mandate: July 14, 1970

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28598

CENTRAL DISTRIBUTORS, INC.,
Plaintiff-Appellee,

versus

M.E.T., INC.,
Defendant,

and JOSEPH L. NELLIS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(June 22, 1970)

Before BELL, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: Central Distributors Inc. (Central) commenced this Florida-based diversity action for breach of a license agreement against M.E. T., Inc. and Joseph L. Nellis in early 1965. The case in different circumstances has already been before this Court twice, *Central Distributors, Inc. v. M.E.T., Inc.*,

5 Cir., 1968, 403 F. 2d 943; *Nellis v. Fulton*, 5 Cir., 1969 [No. 27917, June 3] (petition for writ of mandamus), and the merits of the dispute have at times been overlooked in a continuing quarrel about procedure. M.E.T., Inc. is no longer a party. Now, after five years, the issue of the measure of Nellis's liability to Central is presented to this Court. The District Judge awarded Central $52,426.85, plus costs, and Nellis appeals.

Under the license agreement at issue, Central leased space and established a hardware store in a Hialeah, Florida, shopping center developed by M.E.T., Inc. The agreement provided that the initial lease would extend from November 15, 1963, through November 30, 1966, and reserved to Central an option to terminate the agreement at the end of the first year's operation if the hardware store's gross retail sales amounted to less than $350,000. In the event that Central elected to terminate on this basis, the agreement also provided that M.E.T., Inc. would purchase the store's fixtures and stock-in-trade. Nellis executed a guaranty insuring M.E.T., Inc.'s performance regarding the purchases of fixtures and stock-in-trade from Central.

The store's total gross retail sales for the first year's operation amounted to less than $350,000 and Central elected to terminate the agreement. After M.E.T., Inc. and Nellis failed to comply with Central's demand that they purchase the fixtures and stock-in-trade, Central conducted a going-out-of-business sale beginning in January 1965. Central also filed this action for damages in the District Court. Its complaint alleged that M.E.T., Inc. had refused to make the promised purchases and

that Nellis had ignored demands made upon him as M.E.T., Inc.'s guarantor. When Central completed the presentation of its case, the District Court granted M. E.T., Inc.'s motion for an order of dismissal under Fed. R. Civ. P. 41(b) on the ground that Central had failed to introduce any competent evidence to sustain its burden of proving damages. This Court reversed, stating:

> "In the case before us, Central sought to introduce certain records in order to prove damages. The exclusion of these records from evidence on the basis that they were not listed as exhibits in the pre-trial stipulation was critical and decisive. This ruling, if allowed to stand, effectively bars a meaningful examination of the only real issues present."

Central Distributors, Inc. v. M.E.T., Inc., 5 Cir., 1968 403 F. 2d 943, 946.

While this case proceeded at its snail's pace toward this Court for the first time, as the parties squabbled over procedure, Central retained possession of the fixtures. Unable to sell the fixtures at a price satisfactory to it, Central first stored them in a warehouse in Miami, Florida. Then, in the spring of 1966, the fixtures were shipped to a store operated by Central in Providence, Rhode Island. Central erected and used the fixtures in that store until December 1967, when it went out of business at the Providence location. On May 1, 1968, Central sold the fixtures to Mall Furniture Company, which took over the operation of the Providence store and used the fixtures in place.

After we remanded the case to the District Court, pettifoggery continued, as court time and lawyer time were devoted to Nellis's various motions for continuances, change of venue, and like matters. The argument was complicated by the apparent inability of Nellis, himself a lawyer, to retain counsel to his liking who would be prepared for trial. Finally, in June 1969, a trial to the court on the merits of the parties' dispute began.

The District Court determined that Nellis was liable to Central in the amount of $52,426.85. It computed Central's damages as follows: (1) for the damages resulting from the failure to purchase the fixtures, Central was awarded $13,911.95; (2) for the failure to purchase the inventory, Central was awarded $20,935.84; (3) for other damages (closing expenses) caused by the breach of the license agreement, Central was awarded $6,492.90; (4) to the principal amount of damages, $41,340.69, the Court added interest calculated at 6 per cent from the date of breach, December 26, 1964, or $11,086.16.

We may not set aside the District Court's findings of fact unless these findings are clearly erroneous. Fed. R. Civ. P. 52(a); *see, e. g., United States ex rel. Citizens National Bank of Orlando v. Stringfellow*, 5 Cir, 1969, 414 F. 2d 696; *Chaney v. City of Galveston*, 5 Cir., 1966, 368 F. 2d 774. Having considered all the evidence in this case, we are not left with the definite, firm conviction that a mistake has been committed in connection with the awarding of damages to Central for its losses on the inventory and its closing expenses. Accordingly, we affirm the judgment of the District

Court to the extent of these damages, $27,428.74, plus interest at 6 per cent from December 26, 1964, until paid. *See United States v. United States Gypsum Co.*, 333 U. S. 364, 394-395, 68 S. Ct. 525, 541-542 (1948). With respect to the damages awarded for Central's loss on the fixtures, however, we conclude that the judgment of the District Court must be reversed. By its actions in connection with the fixtures after M.E.T., Inc. and Nellis had failed to purchase them, Central manifested its decision to retain the fixtures for its own use rather than to press for the vindication of any claim it might have had against M.E.T., Inc. or Nellis. The record shows clearly that Central's sale of the fixtures to Mall Furniture Company, after these fixtures had been used by Central for approximately two years in its Providence store, was not an attempt to mitigate the damages occasioned by the breach of the license agreement, but was instead the culmination of a course of action taken independently of, and inconsistent with, prosecution of the claim against Nellis.

We have carefully considered Nellis's other contentions on this appeal and conclude that they are without merit. Discussion of these contentions would serve only to add more words to a case already too filled with them.

The judgment is AFFIRMED IN PART and REVERSED IN PART.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28598

CENTRAL DISTRIBUTORS, INC.,
Plaintiff-Appellee,

versus

M.E.T., INC.,
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and JOSEPH L. NELLIS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Carl K. Hoffman, Miami, Fla., for appellant.

Joseph Nellis, pro se.

Before JOHN R. BROWN, Chief Judge, and COLEMAN and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

We review on appeal and reverse an order of the district court dismissing with prejudice a complaint filed by the appellant, Central Distributors, Inc., (Central hereinafter). The suit was brought under the district court's diversity jurisdiction. The complaint was based upon a license agreement between Central and the appellee (MET hereinafter), whereby Central agreed to lease space and establish a hard-

ware store in a Hialeah, Florida, shopping center developed by MET. The agreement provided that the initial lease would extend from November 15, 1963, through November 30, 1966, with Central reserving the option to terminate the agreement at the end of the first year's operation if the store's gross retail sales amounted to less than $350,000. It also provided that MET would purchase, at Central's option, the store's fixtures and stock-in-trade should Central elect to terminate on this basis. The appellee Joseph Nellis executed a guaranty insuring MET's performance with respect to the purchases.

The store's total gross retail sales for the first year's operation amounted to less than $350,000 and Central elected to terminate the agreement and to sell the stock-in-trade to MET. On December 10, 1964, Central gave written notice of its plans to MET and Joseph Nellis. Both MET and Nellis ignored the notice, and Central thereafter filed this action for damages in the district court. The complaint alleged that MET had refused to make the promised purchases and that Joseph Nellis had ignored the demands made upon him as MET's guarantor.

Our attention is focused on paragraphs 23 and 42 of the license agreement, as these paragraphs set forth the conditions and procedures relevant to the disposition of the stock-in-trade and fixtures. Paragraph 42 requires Central to give MET thirty days notice in writing if the license agreement is to be terminated on the basis that the first year's sales amounted to less than $350,000. Incorporated within this paragraph are the terms of paragraph 40 which direct Central and MET to mutually inspect and inventory the stock-in-trade prior to MET's purchasing it at a price to be based upon and, determined from this inventory. Paragraph 23 obligates MET to purchase the display cases and other fixtures used in the operation of the store, paying an amount equal to Central's investment in the fixtures, less the amount of any reserve claimed thereon for depreciation and amortization purposes.

Prior to trial the attorneys for the respective parties were ordered to appear for a pre-trial conference. They were also directed to meet prior to the scheduled pre-trial conference to examine all exhibits and documents proposed to be used (for other than impeachment purposes) at trial. A pre-trial stipulation was filed with the court, was approved and incorporated into a pre-trial order. On May 24, 1966, the case was heard by the district judge sitting without a jury.

During the course of the trial Central's attorney offered into evidence certain invoices and inventory lists that had not been exhibited at pre-trial nor listed as exhibits in the pre-trial stipulation. The invoices represented charges for the fixtures installed by Central. The court sustained MET's objection to the introduction of these invoices on the basis that the invoices had not been included in the pre-trial stipulation and thus could not be introduced as evidence. Central's general manager testified that the value of the fixtures was approximately $20,000 but this testimony was excluded on the basis that this valuation was founded on records neither in evidence nor listed on the pre-trial stipulation, rather than on the witness' own recollection. Central's attorney then informed the court that he had the records necessary and essential to prove Central's damages, and asked that the pre-trial stipulation be amended to permit their inclusion. This request was denied. A later attempt by Central to introduce inventory lists met a similar fate. Atlthough the pre-trial stipulation referred to "an inventory dated January 1, 1965", Central attempted to bring additional lists into evidence. When these additional lists were exlcuded, Central asked that the pre-trial stipulation be amended in order to prevent manifest injustice. Once more, the court refused to permit amendment of the stipulation.

When Central completed presentation of its case, the court granted MET's motion for an order of dismissal under Rule 41(b), F.R.Civ.P. on the basis that Central had failed to introduce any competent evidence to sustain its burden of proving damages. The district judge concluded that the

court would, in view of the evidence, have to resort to speculation, guesswork, and conjecture in order to award Central anything other than nominal damages. Subsequent motions filed by Central for a new trial and for amendment of the dismissal order and findings of fact were denied.

We have carefully reviewed the record in this case and conclude that the district judge should have allowed the pre-trial stipulation to be amended. Rule 16 of the Federal Rules of Civil Procedure states that the pre-trial order governs the subsequent course of an action unless modified at trial to prevent manifest injustice. It has been suggested that proper treatment of the pre-trial order after entry requires an appropriate balance between firmness to preserve the essential integrity of the order, and adaptability to meet changed or newly discovered conditions or to respond to the special demands of justice.[1]

[1] The position of this Court was clearly stated in *Laird v. Air Carrier Engine Service*, 5 Cir. 1959, 263 F.2d 948, 953, where Judge Brown noted that the court has an *obligation* [emphasis ours], in addition to having the right, to relieve counsel of pre-trial stipulations where such relief is necessary to prevent manifest injustice. When a modification of the stipulation is allowed, the court is responsible for seeing that suitable protective terms are imposed to prevent substantial and real harm to the adverse party.

In the case before us, Central sought to introduce certain records in order to prove damages. The exclusion of these records from evidence on the basis that they were not listed as exhibits in the pre-trial stipulation was critical and decisive. This ruling, if allowed to stand, effectively bars a meaningful examination of the only real issues present.

[2-6] We agree that the pre-trial order and the stipulations incorporated therein should, where reasonably possible, govern the course of a trial. When a party desires to amend

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[1] Christenson, The Pre-Trial Order, 29 F.R.D. 191, 371 (1961).

the stipulations, the court should consider the effect that such amendment, if granted, would have upon the rights of the parties and the disposition of the business of the court. The record in the case before us indicates that MET, in spite of notice from Central, refused to cooperate or participate in taking the inventory specified by the license agreement. MET apparently chose rather to leave the inspection, inventory and disposition of the stock-in-trade to Central. A stipulation of counsel originally designed to expedite a trial should not be rigidly adhered to when it becomes apparent that it may inflict manifest injustice upon one of the subscribers thereto. See *Maryland Casualty Co. v. Rickenbaker*, 4 Cir. 1944, 146 F.2d 751. This was a non-jury trial and a short continuance could have been ordered if necessary to guard against unfair surprise without any great disruption of calendars or waste of court time. The Rules of Civil Procedure were adopted in an effort to put an end to the sporting theory of justice. The result reached here has precisely the opposite effect: the sporting theory of justice is resurrected and revitalized. This, we conclude, should not be permitted.

For the reasons stated herein and in view of the relatively slight inconvenience that would have resulted to the parties and the court had the requested amendments been granted, we reverse the judgment of the district court and remand for a new trial.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 987

JOSEPH L. NELLIS,

Petitioner,

vs.

CENTRAL DISTRIBUTORS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment below of the United States Court of Appeals in a civil case.

OPINIONS BELOW

The Opinion of the District Court of the Southern District of Florida dated the 16 day of June, 1969 is not reported but appears at R. 851-858 and has been reprinted in the Appendix to this Brief. The Opinion of the Court of Appeals dated June 22, 1970 is reported at 428 F.2d 369 and the Opinion dated November 27, 1968 is reported at 403 F.2d 943.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the Court of Appeals was entered on June 22, 1970. By order of Mr. Justice Black, the time within which to file a Petition for a Writ of Certiorari was extended to November 20, 1970. The Petition was filed in this Court on November 19, 1970.

QUESTIONS PRESENTED

According to the Petitioner, the Petition presents the following questions:

1. Whether in a judge-tried breach of contract case in which the issue of damages was complex, Petitioner's rights to procedural due process of law were violated by the trial court's failure to perform its mandatory judicial function to "find the facts specially" (Rule 52(a) F.R.C.P.)?

2. Whether the Court of Appeals violated Petitioner's rights to procedural and substantive due process by according full weight to findings of fact and conclusions of law drafted by counsel for the Respondent and mechanically adopted by the District Court?

3. Whether Petitioner's rights to due process were violated by the lower federal court's refusal to follow the numerous precedents of this Court requiring the United States District Courts, in civil cases, to apply the substantive law of the State in which it resides?

STATEMENT OF THE CASE

The Petition for Certiorari involves a judgment of the District Court awarding damages for breach of a license agreement which was guaranteed by the Petitioner. The Judgment was affirmed in part and reversed in part by the Court of Appeals.

On October 26, 1963, Mutual Employees Trademart, Inc., a corporation of which Petitioner was President and a majority stockholder, entered into a license agreement with the Respondent. This agreement was personally guaranteed by the Petitioner. The Guaranty said in pertinent part, "I, Joseph Nellis, to induce the execution of the aforesaid instrument of license by Central Distributors, Inc., *** and in consideration of One ($1.00) Dollar in hand paid and receipt being acknowledged, and other good and valuable consideration, do hereby warrant, ***".

The Respondent paid all its rent to M.E.T., INC., as required by the License Agreement until M.E.T., INC.'s ground lease was cancelled by the property owners and it was evicted by Court Order for non-payment of rent in November, 1964. Thereafter, on December 10, 1964 Respondent served notice upon M.E.T. INC., and Petitioner that gross retail sales for the period December 1, 1963 — November 30, 1964 had been less than $350,000.00 and that it was terminating the agreement. The Petitioner admitted receiving notice in the Pretrial Stipulation.

The agreement provided that M.E.T., INC., would purchase the store fixtures and stock-in-trade in the event Respondent elected to terminate because of the failure to attain yearly gross retail sales of $350,000.00. Petitioner executed a guaranty for consideration insuring M.E.T. INC.'s performance regarding the purchase of fixtures and stock-in-trade from Respondent. After M.E.T. INC., and Petitioner failed to comply with Respondent's demand that they purchase the fixtures and stock-in-trade Respondent conducted a going-out-of-business sale beginning in January, 1965.

Respondent was unable to sell the nearly new fixtures except for a fraction of their cost and stored them in a warehouse in Hialeah, Florida. In the Spring of 1966, the fixtures were shipped to a store operated by Respondent in Providence, Rhode Island where they were erected and used until December 1967 when that store went out of business. On May 1, 1968, Respondent sold the fixtures to Mall Furniture in an arms length transaction for $9,500.00 worth of promissory notes. Respondent collected $4,750.00 on these notes but has been unable to collect the balance from the insolvent maker of the notes.

The Respondent filed its actions for damages in the District Court in 1966. Petitioner attended the first trial with his local counsel. At the conclusion of Respondent's case at the first trial, the District Court granted Petitioner's Motion for an Order of Dismissal under Rule 41(b) Federal Rules of Civil Procedure on the ground that Central had failed to sustain its burden of proving anything other than nominal damages. The Court of Appeals reversed the District Court and remanded for a new trial. 408 F.2d 948.

After the case was remanded, the District Court granted Petitioner's first motion for a continuance. The District Court denied a second motion for a continuance and a second motion for a change of venue. The case came on for the second pre-trial conference on June 2, 1969. On the morning of June 2, 1969 the District Court was advised that the Petitioner had petitioned the Court of Appeals for a Writ of Mandamus to require the District Court to transfer venue or in the alternative for a continuance. The Court of Appeals denied the Petition and the case was tried non-jury on June 3, 1969.

Petitioner did not attend the second trial, but was represented by Harold Shapiro who had represented Petitioner followng the remand of the case. At the end of a full day's trial and at the close of all of the evidence, the District Court dictated its Findings of Fact and Conclusions of Law into the record. The Court disallowed the claim for $4,750.00 on the unpaid notes received from the sale of the fixtures to a now defunct purchaser, disallowed certain telephone bills as business expenses, and disallowed certain fringe benefits paid to Robert Kaminsky as recoverable damages. The District Court found liability against the Petitioner on the guaranty.

The Court of Appeals said:

> "It computed Central's damages as follows: (1) for the damages resulting from the failure to purchase the fixtures, Central was awarded $13,911.95; (2) for the failure to purchase the inventory, Central was awarded $20,935.84; (3) for other damages (closing expenses) caused by the breach of the license agreement, Central was awarded $6,492.90; (4) to the principal amount of damages, $41,340.69, the Court added interest calculated at 6% from the date of breach, December 26, 1969, or $11,086.16." 428 F.2d at 371.

On the second appeal, the Court of Appeals found that the damages awarded for the loss on the inventory and the closing expenses were sustained by the record. However, the Court of Appeals concluded that the action of the Respondent in shipping the fixtures to Rhode Island and using them there for almost two years before they were sold was not a proper mitigation of damages. Therefore the Court of Appeals reduced the principal amount of the judgment from $41,340.69 to $27,428.74, and affirmed the judgment as reduced.

The Petitioner raised the same questions in the Court of Appeals which he raises in the Petition. The Court of Appeals said:

> "We have carefully considered Nellis's other contentions on this appeal and conclude that they are without merit. Discussion of these contentions would serve only to add more words to a case already too filled with them." 428 F.2d at 371.

REASONS FOR DENYING THE WRIT

1. The decision below is not in conflict with any decision of another Court of Appeals. The Memorandum Opinion of the District Court which is set forth in the appendix fully complies with Rule 52(a) of the Federal Rules of Civil Procedure. The District Court set forth the facts in great detail in the Memorandum Opinion.

Rule 52(a) states in relevant part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein . . . "

2. Although Respondent's counsel complied with the District Court's instruction to submit a proposed memorandum opinion, that draft was not acceptable to the District Court. The Memorandum Opinion which was entered by the District Court is the product of the workings of the district judge's disinterested mind. This is not a complex or complicated case. Cf. *United States* v. *El Paso Natural Gas Co., et al.*, 376 U.S. 657.

3. The record is clear that there was no breach by Respondent of the contract that Petitioner guaranteed. Therefore, there was no release of the guaranty. The District Court and the Court of Appeals followed the substantive law of Florida. The Petitioner's rights to due process were jealously guarded by both the District Court and the

Court of Appeals. The Court of Appeals reduced Petitioner's damages from $41,340.69 to $27,428.74 plus interest.

4. Supreme Court Rule 23(4) provides:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

Petitioner has not stated the facts accurately. While he now claims that notice of the breach was never served upon him (Petition p. 3), he stipulated the exact opposite in the Pre-Trial Stipulation dated December 15, 1965 (R. 397-401). In paragraph IV STIPULATION AS TO FACTS, he admitted:

> "IV. The following facts are stipulated by the parties and require no proof:
>
> c. The Defendants received a letter, dated December 10, 1964, from the Plaintiff, stating that the total for the period December 1, 1963, through November 30, 1964, were less than $350,000.00. . . . "

Furthermore, Petitioner's trial counsel conceded at the outset of the first trial to the District Court that Petitioner had received the notice required by the agreement (R.p. 538).

Another instance of inaccuracy is Petitioner's claim that "Evidence of these prior breaches of the lease agreement was excluded from the first trial of this case because in the words of the District Court, 'it was not raised in the pre-trial stipulation' (Petition p. 3-4)." However, Petitioner failed to state that the District Court agreed with Petitioner's trial counsel that the issue of the Respondent's performance of its obligations under the lease was raised in the pre-trial stipulation, hence evidence on the point was admissible (R. 544, 545). Petitioner did not present any evidence at the first trial because the District Court granted his Rule 41(b) motion. At the second trial the Petitioner did not introduce any evidence (Trial Transcript p. 195).

5. Moreover, after Petitioner has admitted that M.E.T. INC.'s ground lease was cancelled and it was evicted in November 1964, he argues that the Respondent was under a duty to pay rent to the evicted ground lessor instead of the property owner!!! (Petition p. 3-4).

6. Although Petitioner complains that his rights to due process were violated by the District Court and the Court of Appeals, he fails to point out that he did not attend the pre-trial conference in Miami, Florida on June 2, 1969 with his attorney, nor did he attend the trial on June 3, 1969 so that he could assist his local counsel in his own defense — nor offer any excuse for failure to appear at the trial! Petitioner is a member of the District of Columbia Bar with approximately 30 years experience.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit should be denied.

Respectfully submitted,

CARL K. HOFFMANN
900 Dade Federal Savings Building
101 East Flagler Street
Miami, Florida 33131
Attorney for Respondent,
CENTRAL DISTRIBUTORS, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit, was mailed to the office of JOSEPH L. NELLIS, Petitioner, 1819 H. Street, N.W. Washington, D.C., on this 17 day of December, 1970.

CARL K. HOFFMANN
Attorney for Respondent

APPENDIX

APPENDIX

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MEMORANDUM OPINION

(Number and Title Omitted)

(Filed: June 17, 1969)

CHARLES B. FULTON, CHIEF JUDGE:

PRELIMINARY STATEMENT

In this action for damages, the plaintiff seeks to recover under a license agreement dated May 26, 1963 between the plaintiff and the defendant, M.E.T. INC., whereby the plaintiff agreed to lease space and establish a hardware store in a Hialeah, Florida shopping center operated by M.E.T. The defendant, Joseph L. Nellis executed a guaranty insuring M.E.T.'s performance under the license agreement. The suit was brought under the Court's diversity jurisdiction.

The complaint seeks recovery in excess of $10,000., exclusive of interest and costs. The plaintiff is a New York corporation with its principal place of business in Schenectady, New York. The defendant, M.E.T. Inc., is a Delaware corporation with its principal place of business in Hialeah, Florida. The defendant, Joseph L. Nellis is a citizen and resident of the District of Columbia.

This case first came on for trial by the Court sitting without a jury on May 24, 1966. The Court was of the opinion that the liability of the defendants was established by the overwhelming weight of the evidence by the stipu-

lated facts contained in the Pre-Trial Stipulation and the facts admitted in open court by defendants' counsel. However, when the plaintiff completed the presentation of its case, the Court granted the defendants' motion for an order of dismissal under Rule 41(b) F.R.Civ.P. on the ground that the plaintiff had failed to introduce any competent evidence to sustain its burden of proving damages. Although the plaintiff had sought to introduce certain records to prove damages, they were excluded on the basis that they were not listed as exhibits in the Pre-Trial Stipulation.

On appeal, this Court's judgment was reversed and the case remanded for a new trial. See the opinion of United States Court of Appeals for the Fifth Circuit reported in 403 F.2d 943. The Order on the Mandate entered on January 3, 1969 set the case for trial on March 31, 1969. A motion for continuance filed by Joseph L. Nellis dated January 8, 1969 and argued by Harold Shapiro of Miami Beach, Florida was granted and the Pre-Trial and Trial date was set for June 2 and June 3, 1969 respectively in this Court's SECOND AMENDED ORDER FOR PRE-TRIAL CONFERENCE AND NOTICE OF TRIAL filed March 7, 1969.

The Court was advised that neither counsel for the defendants, nor Josoph L. Nellis who is an attorney with 25 years experience, met with counsel for the plaintiff, as required by the ORDER FOR PRE-TRIAL CONFERENCE. The Court received a letter from Joseph L. Nellis dated April 25, 1969 in which he sought a postponement of the pre-trial requirements. The Court advised Joseph Nellis by letter dated April 30, 1969 that it must insist on compliance with the Pre-Trial Order.

Thereafter Joseph L. Nellis filed a MOTION TO TRANSFER VENUE AND/OR REMOVAL OF CAUSE TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. These motions were substantially similar to the motions to transfer or dismiss under Title 28 U.S.C. 1404(a) filed by the defendants in August, 1965 and denied by the Court in its Order of October 8, 1965. The Court denied the Motion to Transfer Venue and an oral motion made by Harold Shapiro for a continuance of the case.

On the morning of June 2, 1969 the Court was advised that the defendant, Joseph Nellis had petitioned the United States Court of Appeals for the Fifth Circuit for a Writ of Mandamus to require this Court to transfer this case to the District of Columbia or in the alternative for a continuance.

At the Pre-Trial Conference on June 2, 1969, Harold Shapiro, on behalf of Joseph Nellis, advised the Court that he had examined and seen the plaintiff's exhibits at the office of plaintiff's counsel. He stated that he was not authorized to enter into a Pre-Trial Stipulation by Joseph Nellis and that Joseph Nellis was not present in the courtroom. Joseph Nellis was present at the first Pre-Trial conference of this case on January 17, 1966 and at the first trial of this case on May 24, 1966. This cause came on for trial before the Court without a jury on June 3, 1969. Joseph Nellis filed new motions to transfer venue and motion for continuance, and Harold Shapiro filed a motion to withdraw as counsel which were denied by the Court. The Court received notice on June 3, 1969 that the Court of Appeals had denied the Petition for a Writ of Mandamus on June 2, 1969. Counsel for Joseph Nellis informed the Court that Nellis knew that the Petition for a Writ of Mandamus had been denied.

LIABILITY

The liability of the defendants, M.E.T. INC., and Joseph Nellis to the plaintiff was established at the first trial of this cause by the overwhelming weight of the evidence. The stipulated facts contained in paragraph IV of the Pre-Trial Stipulation dated December 15, 1965, the facts admitted by defendants' counsel in open court at the first trial of this case on May 24, 1966 which are found in the printed record on appeal at pages 11-19, the testimony of Edward Dziura, defendant M.E.T. Inc.'s Executive Vice President and General Manager, found at pages 23-28, and the facts found in the opinion of the court of appeals reported at 403 F.2d 943, all conclusively established the liability of the defendant in this case, and the breach of the license agreement and guaranty on December 26, 1964. The defendants, M.E.T. Inc., and Joseph Nellis, did not call any witnesses nor introduce any exhibits or other evidence at the trial of this case. The Court was impressed with the probity, and demeanor of the witnesses Lewis Golub, Herbert Cohen, and the other witnesses for the plaintiff and does credit their testimony.

DAMAGES

I — Fixtures and Equipment.

Paragraph 23 of the license agreement obligated M.E.T. and Nellis to purchase the fixtures and other equipment used in the operation of the store at the plaintiff's cost less the amount of any reserve claimed thereon for depreciation and amortization purposes.

The plaintiff established by the preponderance of the credible, competent and substantial evidence, namely its general ledgers, depreciation schedules, invoices, and testimony that it suffered a loss of $18,911.95 because of the failure of the defendants to purchase its fixtures while they were in the Hialeah, Florida store. The plaintiff mitigated the damages by storing the fixtures at a warehouse in Miami, Florida when it was unable to sell the fixtures except at a great sacrifice. Thereafter it shipped the fixtures to a store in Providence, Rhode Island where it eventually sold them to Mall Furniture for $9,500.00 for which it received 12 unsecured non-interest bearing notes.

The evidence shows that it has collected $4,750.00 on the notes received from Mall Furniture, but has not collected the remaining $4,750.00. Although there is testimony that the plaintiff has placed these six uncollected notes in the hands of an attorney for collection, and that the maker is on the verge of bankruptcy, the court must presume in the absence of evidence to the contrary, that the maker is solvent and able to pay all or some of this indebtedness in time. Since the fixtures and equipment had some life expectancy at the time of the sale it should have protected itself by obtaining some security for the notes. Therefore, the court finds that the defendants should be credited with the $9,500.00 face amount of the notes.

The Court computes the plaintiff's damages from the failure of the defendants to purchase the fixtures and equipment as follows:

FIXTURES AND EQUIPMENT

Original Cost		$24,178.64
Less accumulated Depreciation through 4/30/64	$1,688.59	
Depreciation from 4/30/64 - 12/26/64	1,569.64	3,258.23
Book Value at 12/26/64		$20,920.41
Less Depreciation while in use at Providence, R. I., (Williams Central) 1 year through 4/29/67	1,873.79	
8 months	1,249.18	3,122.97
		$17,797.44
Credit to defendants from sale to Mall Furniture		9,500.00
Net after proceeds		$ 8,297.44
Bond Transfer, Inc., invoice to move fixtures & equipment from Hialeah to storage	214.50	
Spector & Sons Storage charge (13 mos. at $50.00 per month)	700.00	
Sitka Store Fixtures (preparation for moving)	256.57	
Interest on Curtiss National Bank Loan 1/1/65 - 2/1/66	954.16	
United Van Lines Invoice for transportation from Miami to Providence, Rhode Island	3,489.28	5,614.51
TOTAL LOSS		$13,911.95

II — Inventory

Paragraph 40 of the license agreement obligated the defendants to purchase the plaintiff's inventory of merchandise and stock-in-trade at its posted retail shelf price less a sum equal to thirty-five (35%) percent of the total retail price. The Court finds that the plaintiff had an inventory on December 26, 1964 which was worth $70,246.52 at its posted retail shelf price. Therefore the defendants were obligated to pay the plaintiff the sum of $45,660.52 for the inventory of merchandise under their contract.

The plaintiff again established by the preponderance of the credible, competent and substantial evidence, namely the company's books and records, its inventory analysis ledger, the testimony of the witnesses Lewis Golub, John Smaldino, Herbert Cohen, and the other witnesses for the plaintiff, to a reasonable certainty that it suffered a loss of $20,935.84 because of the failure of the defendants to purchase its merchandise and stock-in-trade. When the defendants breached the license agreement, the plaintiff conducted a "going-out-of-business" sale in January, 1965. At the conclusion of its operations in Hialeah, Florida, plaintiff transferred part of the inventory then on hand to another store it operated in Tampa, Florida where it took further markdowns on the goods. It contributed some merchandise to charity, and shipped the remainder to its warehouse in New York where most of it was sold to buyers of distress merchandise. The Court finds that the plaintiff made reasonable efforts under the circumstances of this case to mitigate the damages.

The Court computes the loss to the plaintiff from the failure of the defendants to purchase the merchandise as follows; (The figures are shown at retail except as noted):

Inventory at Retail on 12/26/64	$70,246.52
Additional Merchandise to facilitate "going-out-of-business" sale	2,613.04
Total	$72,859.56
Less transfers to the Tampa and New York warehouse	25,913.00
Net after transfers	$46,946.56
Proceeds of "going-out-of-business" sale	25,006.81
Net after sales	$21,439.75
Less 65% of above retail amount	$13,935.84
Additional loss on goods transferred to Tampa and New York	7,000.00
Total Loss on Inventory	$20,935.84

III - Closing Expenses

The Court finds that the plaintiff sustained expenses in the amount of $6,492.90 subsequent to December 26, 1964 in connection with its "going-out-of-business" sale and the closing of its Hialeah store which it would not have sustained if the defendants had purchased the merchandise and fixtures pursuant to the license agreement. These expenses are a direct result of the breach of the license agreement.

The various expense items allowed were established by a preponderance of the evidence which consisted of the cancelled checks, invoices, original expense vouchers, petty

cash vouchers, payroll journals and cancelled payroll checks. The Court disallows the amount claimed by the plaintiff as fringe benefits for Robert Kaminsky in addition to the salary of Robert Kaminsky.

The Court allows the following expenses as reasonable and necessary to the plaintiff's going-out-of-business sale and closing of the Hialeah store in further mitigation of damages:

1.	Plane fares for Lewis Golub, Robert Kaminsky and John Smaldino	$ 198.81
2.	Budget Car Rental for R. Kaminsky	92.03
3.	Crossway Motel expense for Lewis Golub	10.60
4.	Crossway Motel expense for Lewis Golub and R. Kaminsky	103.14
5.	Expense Reimbursement to R. Kaminsky	76.80
6.	Advertising for G.O.B. Sale	100.00
7.	Advertising for G.O.B. Sale	500.00
8.	Ryder Truck Rental	100.00
9.	Ryder Truck Rental	50.00
10.	United Airlines plane fare for John Smaldino	181.65
11.	T.W.A. plane fare for Harold Stahr	78.96
12.	Harold Stahr, expenses in Miami	46.50
13.	Petty Cash Disbursements for labor to pack trucks	150.00
14.	Petty Cash Disbursements for week ending 1/2/65	5.10

15.	Petty Cash Disbursements for week ending 1/9/65	52.00
16.	Petty Cash Disbursements for week ending 1/23/65	25.00
17.	Petty Cash Disbursements for week ending 1/16/65	13.95
18.	Petty Cash Disbursements for week ending 2/6/65	7.23
19.	Harold Stahr's expenses 2/6/65	42.22
20.	R. Kaminsky's expenses	117.80
21.	Bobi Toure — R. Kaminsky plane fare to Miami and return	169.05
		$2,120.55
22.	Harold Stahr's expenses 2/20/65	63.00
23.	Crossway Airport Inn — Expenses for H. Stahr & R. Kaminsky	173.40
24.	Pilot Freight charge for shipping merchandise back to warehouse	655.10
25.	Telephone expense	27.95
26.	Telephone expense	41.95
27.	Telephone expense	84.59
28.	Robert Kaminsky salary in Miami	693.00
29.	Miami Payroll 12/26/64 through closing	2,633.39
	Expense Total —	$6,492.93

INTEREST

The license agreement provides that it is to be construed under the laws of the State of Florida. The law is well established in Florida that interest attaches as an incident to a breach of contract and accrues from the date of the breach of the contract. See *18 Fla.Jur.* Interest § 3; and *Sullivan v. McMillan*, 37 Fla. 124, 19 So. 649. Therefore, the Court concludes the plaintiff is entitled to legal interest on the sum of $41,340.69 from December 26, 1964.

Plaintiff is entitled to recover from the defendants M.E.T. Inc., and Joseph L. Nellis the sum of $41,340.69, with interest from December 26, 1964, and its costs of suit. This Opinion will constitute the Findings of Fact and Conclusions of Law. Counsel will submit a proposed judgment.

DATED at Miami, Florida this 16 day of June, 1969.

/s/ Charles B. Fulton
CHIEF JUDGE
UNITED STATES DISTRICT COURT